PARTIES:	LEWIS v THE QUEEN
TITLE OF COURT:	In the Court of Criminal Appeal of the Northern Territory of Australia
JURISDICTION:	APPEAL from the Supreme Court of the Northern Territory exercising Territory Jurisdiction
FILE №:	CA 9 of 1990
DELIVERED:	Delivered at Darwin 5 August 1992
HEARING DATES:	Heard at Darwin 4 and 5 August 1992
JUDGMENT OF:	Angel, Mildren, Priestley JJ

CATCHWORDS:

APPEAL AND NEW TRIAL - Points and objections not taken below - Conviction for manslaughter - Whether alternative verdict of dangerous act ought to be left to jury - Miscarriage of justice - Unsafe conviction - Conviction quashed and alternative substituted - Head sentence adjusted

Criminal Code (NT),ss31,154,318,412
Mraz v The Queen (1955) 93 CLR 493, applied.
Attorney-General v Wurrabadlumba (1990) 74 NTR 5, discussed.
R v Campbell (1990) 99 FLR 107, discussed.

CRIMINAL LAW AND PROCEDURE - Appeal and new trial - Appeal from conviction for manslaughter - Whether alternative verdict ought to be left to jury - Circumstances where s154 applicable - Miscarriage of justice - Unsafe conviction - Conviction quashed and alternative substituted - Head sentence adjusted

Criminal Code (NT),ss31,154,318,412
Chidiac v The Queen (1990-91) 171 CLR 432, applied.
Morris v The Queen (1987) 163 CLR 454, applied.
Mraz v The Queen (1955) 93 CLR 493, applied.
Attorney-General v Wurrabadlumba (1990) 74 NTR 5, discussed.
R v Campbell (1990) 99 FLR 107, discussed.

CRIMINAL LAW AND PROCEDURE - Jurisdiction, practice and procedure - Judges summing up - Alternative verdict to be left to jury - Appellant not properly convicted

Criminal Code (NT),ss31,154,318,412
Mraz v The Queen (1955) 93 CLR 493, applied.

CRIMINAL LAW AND PROCEDURE - Jurisdiction, practice and procedure - Verdict - Evidence capable of supporting manslaughter - Judge bound to leave to jury - Jury acting reasonably ought have entertained reasonable doubt

Chidiac v The Queen (1990-91) 171 CLR 432, applied.
Morris v The Queen (1987) 163 CLR 454, applied.
Doney v The Queen (1990) 171 CLR 207, referred to.

REPRESENTATION:

Counsel
Appellant: Self
Respondent: W Karczewski

Solicitors
Appellant: n/a
Respondent: DPP

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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

№ CA 9 of 1990

IN THE MATTER of an appeal from judgment in proceedings №131 of 1989

BETWEEN:

MICHAEL ANTHONY LEWIS
Appellant

AND:

THE QUEEN
Respondent

CORAM: Angel, Mildren and Priestley JJ

REASONS FOR JUDGMENT
(Delivered *ex-tempore* 5 August 1992)

The judgment of the Court was delivered by Angel J:

On 13 June 1990, after a jury trial on an indictment for murder, the appellant was convicted of manslaughter. The appellant, who is self-represented in this appeal, raised a number of grounds of appeal, but, in the result, it is only necessary to consider one of them, namely that the learned trial judge erred in law in failing to leave an alternative verdict to the jury of guilty of a breach of ss154(1) and (3) of the *Criminal Code*.

The learned trial judge, presumably having in mind such cases as *R v Campbell* (1990) 99 FLR 107, ruled that s154 was not available on the evidence. We are of the view that, in terms of s412 of the *Criminal Code*, the appellant was not properly convicted of manslaughter because s154 was not left to the jury.

The brother of the appellant died from knife wounds incurred in a scuffle with the appellant in an altercation

which occurred in the family household. The mother of the appellant and the deceased was trying to break up the altercation between the brothers and, on the evidence, was at least potentially endangered by the presence of the knife.

In *Attorney-General v Wurrabadlumba* (1990) 74 NTR 5 at 11, decided after both *Campbell, supra,* and the trial in this case, it was held, on an Attorney-General's reference, that s154 was inapplicable to circumstances where the relationship between the accused and his intended victim was that of defacto husband and wife, and the actions of the accused giving rise to the charge occurred in such location or in such manner that no person other than the intended victim was caused any serious danger, actual or potential.

In that case the Chief Justice said (at 11):

> "I see nothing inherently absurd in maintaining that, where s318 allows s154 as an alternative verdict to murder or manslaughter, the jury must be instructed that the section applies only if they are satisfied that the person affected by the act of the accused was in the circumstances a member of the public. No doubt the presiding judge will be called upon to decide whether there is evidence fit to go to the jury on this point. No doubt, also, there will arise examples where the question may be one of some difficulty. A person may be a member of the public for some purposes and not for others. The test is elastic and will depend upon the circumstances."

In our view *Attorney-General v Wurrabadlumba, supra,* is distinguishable from the present case because, on the Attorney-General's reference, there was no person other than the intended victim who was actually or potentially endangered. Being of this view, it is not necessary on this appeal to consider the validity of the 1991 amendment to s154 or the scope of its retrospective operation, if valid.

Because s154 was not left to the jury there was a miscarriage of justice, in that the accused lost the opportunity of the jury considering not only murder and manslaughter but also dangerous act as possible alternative verdicts: see *Mraz v The Queen* (1955) 93 CLR 493 at 514.

We are also of the view that on the evidence before the jury the conviction of the appellant is unsafe and that he could not properly be convicted of manslaughter in terms of s412 of the *Criminal Code*. The learned trial judge, in sentencing the appellant, said (at page 436 of the transcript):

> "Now, the jury have said one of two things to me. Either that you foresaw the death of your brother as a possible consequence of what you were doing - not intending it, but foresaw it as a possible consequence of what you were doing. Or, alternatively - and this is the theoretical alternative - it's one I don't accept - alternatively, that you intended to cause his death but you did so under the influence of provocation as I defined it to the jury.
>
> Since I am free to make a finding of fact for the purpose of sentencing, within the limits of that verdict, I must make a finding of fact as between those two possibilities. And my finding is that you did not intend to cause your brother's death and that it was not technically as a result of provocation that caused the jury to reduce what would otherwise have been murder to manslaughter. But it was the former one I mentioned, namely, that you did not intend your brother's death but you foresaw the possibility of death as a result of what you were doing."

Having considered the evidence, we reach the same conclusion as the trial judge, as to the reasoning of the jury for the conviction. We consider the verdict unsafe for lack of evidence of actual foresight and we do so for ourselves after reviewing the evidence. We consider there is a lack of evidence of actual foresight of the death of the deceased as a possible consequence of the actions of the appellant, a necessary ingredient in the crime of manslaughter under the *Criminal Code*: see s31.

The Crown says actual foresight is evident or may be inferred from the nature of the weapon used, the number and location and tracking of the wounds inflicted on the deceased, the presence of the knife at the scene, the appellant's given reasons for the presence of his knife, and the evidence of Doctor Lee. We think in the circumstances of this case it would be unsafe to infer actual foresight on the part of the appellant from this evidence.

The question of the state of mind of the appellant in this case is a matter of circumstantial evidence. There is nothing in the appellant's account of events to the police supporting actual foresight. The mother's evidence is insufficient to support such a finding. The wounds and weapon are not inconsistent with accident or lack of foresight to the degree necessary to establish manslaughter or such as to exclude a reasonable hypothesis of innocence of manslaughter.

In saying this we particularly have in mind the reliance by the Crown upon the evidence of Doctor Lee, but having considered it we are of the view it leaves too much to speculation. It is impossible other than to speculate as to the manner and order of the infliction of the injuries upon the deceased. That being so, even though there was evidence capable of supporting a verdict of guilty of manslaughter such that the judge was bound to leave that issue to the jury (see *Doney v The Queen* (1990) 171 CLR 207), the jury, acting reasonably, ought to have entertained a reasonable doubt as to the guilt of the appellant: *Morris v The Queen* (1987) 163 CLR 454; *Chidiac v The Queen* (1990-91) 171 CLR 432.

Having reached that conclusion, we intimate to the Crown that we think at the moment the appropriate course is for the court to substitute a conviction under s154, pursuant

to s412. We would like to hear from you as to whether you have any submissions to make.

[The Crown then indicated that the course proposed by the court was appropriate in the circumstances.]

The appellant, not having been properly convicted of manslaughter, and because he could not be properly convicted of manslaughter on the evidence led by the Crown at the trial, and there being uncontradicted evidence that an offence under s154 was committed, we are of the view that the proper course for this court is, pursuant to s412 of the *Criminal Code* to quash the conviction for manslaughter and substitute a conviction, for that on 11 May 1989 the accused, in handling a knife, caused actual danger to the life of Richard Nelson Lewis in circumstances where an ordinary person similarly circumstanced would have clearly foreseen such danger and not have so handled the knife, with the following circumstance of aggravation, namely that he caused the death of the said Richard Nelson Lewis contrary to ss154(1) and (3) of the *Criminal Code*.

The appellant had other grounds of appeal none of which in their nature immediately savour of success. But even if good, they would only support an order for a retrial on manslaughter and in view of what we have said about that charge, that is manslaughter, there is no need to consider those submissions further.

At one stage the appellant before this court said he was guilty of a breach of s154 and although he later qualified this, the evidence independently of that satisfies us beyond reasonable doubt that he was guilty of that offence. So the order of the court is that the manslaughter conviction will be quashed and a conviction in the terms just outlined for a violation of s154 of the *Criminal Code* will be substituted therefor. It is now appropriate for

this court to entertain submissions as to sentence in respect of that new conviction.

[Their Honours then adjourned to 7 August 1992 to consider submissions on sentence. On 7 August 1992 the court, after taking into account that the appellant had already served almost one year's imprisonment and had successfully complied with the terms of his bond since his release, sentenced the appellant to imprisonment for four years back-dated to 18 January 1990, and ordered that the appellant be released forthwith upon entering into a bond in the sum of $6,000 own recognizance with one surety in the sum of $3,000 to be of good behaviour for the balance of the term of imprisonment.]